

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID EDWARD OWEN,

Defendant-Appellant.

UNPUBLISHED

October 20, 2005

No. 255393

Midland Circuit Court

LC No. 03-001783-FH

Before: Kelly, P.J., and Meter and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2), possession of burglary tools, MCL 750.116, third-degree fleeing and eluding a police officer, MCL 750.479a(3), felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent sentences of twenty to fifty years' imprisonment for each conviction other than felony-firearm, for which he was sentenced to two years' imprisonment consecutive to the other sentences. Defendant appeals as of right from his convictions and his sentences. We affirm.

Defendant first argues that he received ineffective assistance of counsel. No evidentiary hearing was held in this case, and defendant did not make a testimonial record with respect to this claim, so review is limited to the existing record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003). Trial counsel is presumed to have been effective. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Thus, to find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). We find neither.

Defendant argues that counsel was ineffective for characterizing him as "a bad guy" during closing argument. However, counsel's opening statement demonstrated a strategy of admitting guilt of certain crimes for which the evidence was particularly overwhelming and to focus his efforts on disputing that defendant possessed a weapon, thereby hopefully averting findings of guilt of felon in possession of a firearm, felony-firearm, and first-degree home invasion. Consistently, closing argument emphasized that, although defendant was clearly guilty of second-degree home invasion, possession of burglary tools, and fleeing and eluding, the

prosecution had failed to prove beyond a reasonable doubt that defendant possessed a weapon during the commission of these crimes. If “the evidence obviously points to defendant’s guilt, it can be better tactically to admit guilt and assert a defense or to admit guilt on some charges but maintain innocence on others.” *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004). Such a strategy “does not constitute ineffective assistance of counsel simply because it does not work,” and we will not second-guess that strategy. *Id.* at 58, 61. Counsel was not ineffective for describing defendant as “a bad guy.”

Defendant argues that trial counsel was ineffective for failing to object when the jury was twice informed of the nature of defendant’s prior felony conviction. A jury might misuse evidence of a prior conviction to infer bad character. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). However, even where the prior crime is similar to a charged crime and thus even more likely misused, overwhelming other evidence can make any such error harmless. *People v Swint*, 225 Mich App 353, 378-379; 572 NW2d 666 (1997). Defendant did not contest the fact that he committed a home invasion, only that he possessed a weapon. The prosecution presented ample evidence for the jury to find beyond a reasonable doubt that defendant was in possession of a weapon at the time of the home invasion. The evidence of defendant’s guilt of first-degree home invasion was overwhelming, so there is no reasonable probability that but for counsel’s alleged error, the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Trial counsel was not ineffective for this reason.

Defendant argues that the trial court committed error requiring reversal in failing to instruct the jury on the order in which they could consider the alternate charges of first-degree and second-degree home invasion. Defendant also argues that trial counsel was ineffective for failing to object. We disagree. The trial court did not read SJI2d 3.11(5) or otherwise tell the jury in so many words to consider the principle charge first and only to consider the lesser offense after either finding the defendant not guilty of the first or being unable to agree on his guilt thereof. See *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). Rather, it instructed the jury on the elements of first-degree home invasion, then it explained that the jury “may also consider with respect to count one the lesser offense of home invasion in the second degree.” After giving instructions on all counts, the court informed the jury that its verdict must be unanimous. These instructions effectively freed the jury to consider the lesser offense at any time, irrespective of its conclusions regarding the primary charge, which is the opposite of the situation our Supreme Court addressed in *Handley*. Although technically erroneous, defendant was not harmed thereby.

Defendant also argues that he is entitled to resentencing on the ground that his sentence was improperly determined under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has explicitly determined that *Blakely*, *supra*, does not apply to Michigan’s indeterminate statutory sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). See also *People v Morson*, 471 Mich 1201, 1201; 683 NW2d 678 (2004). Accordingly, defendant’s argument is without merit.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Alton T. Davis